

March 29, 1999, Order from a 41.5 percent permanent partial general disability based on a work disability to an 11 percent permanent partial general disability based on functional impairment.

Claimant appeals the ALJ's modification and argues the no work disability presumption does not apply because the claimant is not earning a comparable wage while employed by Boeing. Claimant also argues, although he is currently working for Boeing in Wichita, Kansas, he remains a resident of Arkansas City, Cowley County, Kansas. Therefore, the claimant argues his loss of ability to perform work and to earn comparable wage has not changed because his open labor market has not changed. Accordingly, the claimant argues, since his open labor market and his permanent work restrictions have not changed, then he remains entitled to the 41.5 percent work disability award. Claimant also requests the Board to award attorney fees to his attorney for the time the attorney was required to spend representing the claimant in the post-award review and modification proceedings. The ALJ did not address the attorney fee issue in the Award. But the claimant raised the issue before the ALJ and included an affidavit along with an itemization of the time spent in his submission letter to the ALJ.

Conversely, respondent requests the Board to affirm the ALJ's Review and Modification of an Award which modified claimant's 41.5 percent permanent partial general disability to an 11 percent permanent partial general disability. But the respondent argues the effective date of the modification should be the day claimant started working for Boeing on May 22, 1997, instead of December 16, 1997, the effective date of the review and modification. The respondent also argues the ALJ's modified award was incorrectly calculated as the ALJ did not credit the award for the 39.29 weeks of temporary total disability compensation paid to the claimant resulting in claimant receiving more than the 415 statutory weeks for permanent partial general disability benefits. Additionally, respondent also asserts claimant violated the fraud and abuse act found at K.S.A. 44-5,120 et. seq., because he concealed the fact he was employed by Boeing at a comparable wage. Respondent requests the Board to order claimant to repay the monies fraudulently obtained, plus \$2,000 in penalties and costs.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, and considering the briefs and the parties' oral arguments, the Board makes the following findings and conclusions:

The facts of this case are generally not in dispute. Claimant injured his back while working for the respondent on December 12, 1991. On March 2, 1992, claimant underwent surgery which included a spinal fusion. Claimant returned to work for respondent performing his same job at a comparable wage. The parties stipulated to an 11 percent permanent functional impairment. Because claimant was injured in 1991, this is an "old act" case as the accident occurred before the extensive 1993 amendments to the workers compensation act.

The Board in a December 17, 1996, Order found claimant had failed to overcome the no work disability presumption and awarded claimant permanent partial general disability benefits based on an 11 percent functional impairment. Respondent, on September 27, 1996, closed their refinery where claimant was employed. Claimant was then laid off. At that time, claimant filed a timely application for review and modification on December 23, 1996. In a March 29, 1999, Order, the Board affirmed the Assistant Director's review and modification award finding claimant was entitled to a 41.5 percent work disability from the layoff date.

On May 22, 1997, claimant started working for Boeing in Wichita, Kansas. Claimant chose not to move to Wichita and remains a resident of Arkansas City, Cowley County, Kansas. He drives 2.5 hours round trip per day to work. Respondent discovered that claimant was working for Boeing during his deposition which was taken on May 6, 1998. Thereafter, respondent filed an application for review and modification pursuant to K.S.A. 1991 Supp. 44-528 requesting the ALJ to decrease claimant's 41.5 percent permanent partial general disability award to an 11 percent permanent partial disability award.

The review and modification hearing was held on February 11, 1999. The claimant did not testify at this hearing as the parties stipulated that the claimant's May 6, 1998, deposition testimony would be made part of the review and modification record. The respondent offered and the ALJ admitted at the hearing wage information from Boeing which included claimant's hourly rate, overtime and fringe benefit costs while working for Boeing from December 4, 1997, through April 25, 1998. Thereafter, the parties filed a stipulation on July 13, 1999, agreeing that claimant's post injury average weekly wage while working for Boeing was \$762.54 per week based on a \$13.45 straight time hourly rate for 40 hours per week or \$538; an averaged six-month overtime per week of \$38.42 (based on the period from May 25, 1998, through November 25, 1998); and a fringe benefit cost of \$186.12 per week.

The review and modification statute provides an award may be modified if the functional impairment or work disability of the injured worker has increased or diminished.¹ Review and modification of an award is appropriate where there has been a change in claimant's condition.² The change does not have to be a change in claimant's physical condition. It could be an economic change, such as a claimant returning to work at a

¹ K.S.A. 1991 Supp. 44-528(a).

² *Gile v. Associated Co.*, 223 Kan. 739, 740, 576 P.2d 663 (1978).

comparable wage,³ or losing a job because of a layoff.⁴ The burden of establishing the changed condition is on the party asserting them.⁵

The measurement of permanent partial general disability on claimant's December 12, 1991, accident date was the extent to which an injured worker had lost the ability to perform work and to earn comparable wages in the open labor market. Except the worker's permanent partial general disability would not be less than the worker's functional impairment. If the worker earned post-injury wages comparable to his pre-injury average weekly wage, then a presumption against work disability applied.⁶

Here, the claimant presents two arguments against modification of his work disability award. First, claimant argues he is not earning a comparable wage so the no work disability presumption does not apply. Second, even though he is employed at Boeing in Wichita, Kansas, he remains a resident of Arkansas City, Cowley County, Kansas. Claimant argues he has had no change in his open labor market and his work restrictions have not changed. Accordingly, claimant argues he remains entitled to a 41.5 percent work disability because his loss of ability to perform work and to earn comparable wages in his open labor market have not changed.

The Board disagrees with both of the claimant's arguments. First, as previously noted, the parties stipulated to a post-injury average weekly wage of \$762.54, computed by using the straight-time hourly rate of \$13.45 plus overtime and fringe benefits. The Boeing wage information, however, does not show the claimant earned \$13.45 per hour until October 8, 1998. But the wage information does show claimant earned \$13.02 per hour as of December 16, 1997, the effective date of the review and modification. Utilizing the stipulated overtime amount of \$38.42 per week plus the stipulated weekly cost of fringe benefits of \$186.12 per week and claimant's post-injury hourly rate of \$13.02 yields a \$745.34 post-injury average weekly wage. The \$745.34 per week post-injury average weekly wage is 93 percent of claimant's pre-injury average weekly wage of \$802.77. The stipulated post-injury average weekly wage of \$762.54, based on \$13.45 per hour plus the weekly overtime and fringe benefits, is 95 percent of claimant's pre-injury average weekly wage.

The Board finds, at the time claimant commenced earning a post-injury average weekly wage at Boeing which equaled 90 percent or more of his pre-injury average weekly wage, he was earning a comparable wage as contemplated in K.S.A. 1991 Supp. 44-

³ *Ruddick v. Boeing Co.*, 263 Kan. 494, 497, 949 P.2d 1132 (1997).

⁴ *Lee v. Boeing Co.*, 21 Kan. App.2d 365, 372, 899 P.2d 516 (1995).

⁵ See *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App.2d 527, 531, 598 P.2d 544 (1979).

⁶ K.S.A. 1991 Supp. 44-510e(a).

510e(a). The Board bases this conclusion, in part, on the 1993 amendments to K.S.A. 44-510e(a) which limit a worker's permanent partial general disability compensation to the functional impairment as long as the employee earns 90 percent of his or her pre-injury wage.⁷ The Kansas Court of Appeals reviewed the legislative history of the 1993 amendments and found those amendments were a series of attempts to ensure that a worker did not collect work disability benefits while earning substantial post-injury wages. The Court of Appeals concluded the 1993 amendments did not change the law surrounding the presumption but merely clarified it.⁸ The Board finds the worker's post-injury level earnings equaling 90 percent of the worker's pre-injury average weekly wage is a comparable wage invoking the presumption of no work disability under the pre-1993 law.

The Board further finds that, at the time claimant chose to travel to Wichita, Kansas and work for Boeing at a comparable wage, the no work disability presumption applied. At that time, claimant chose to expand his open labor market to include Wichita, Kansas. Because claimant's work restrictions did not change, the Board's December 17, 1996, Order that determined claimant failed to overcome the no work disability presumption while working at a comparable wage has not changed and claimant has failed to rebut the presumption. Accordingly, the Board affirms the ALJ's finding that claimant's permanent partial general disability is limited to the stipulated 11 percent functional impairment.

Respondent argues, however, the effective date of the modification of claimant's work disability award should be May 22, 1997, the day claimant started working for Boeing. The respondent argues that K.S.A. 1991 Supp. 44-528(b) allows the Board to cancel a worker's award and terminate his or her compensation if he or she is earning the same or higher wages post-injury as he or she did pre-injury. The respondent requests the Board to cancel and terminate claimant's award effective May 22, 1997. The Board disagrees with the respondent's argument. The Board finds that claimant's work disability award should be modified but not cancelled. Any modification shall be effective the date of the change, except in no event shall the effective date be more than six months before the filing of the application for review and modification.⁹

The claimant also requested the Board to award attorney fees to his attorney for services the attorney performed in the post-award review and modification proceedings. Claimant raised the attorney fee issue in his submission letter and attached an affidavit with supporting itemization of time spent representing claimant in the amount of 22.35 hours at \$100 per hour totaling \$2,235. At oral argument before the Board, claimant

⁷ K.S.A. 44-510e(a) (Furse 1993).

⁸ *Lee*, 21 Kan. App.2d at 371.

⁹ K.S.A. 1991 Supp. 44-528(d).

requested an additional five hours for the time his attorney spent for services since he submitted his submission letter to the ALJ. The total attorney fee request is for \$2,735.

After the ultimate disposition of the original claim, and in connection with an application for review and modification, an attorney who renders services for an employee, shall be awarded reasonable and customary fees for such services. But any such services rendered by an attorney resulting in an additional award of compensation, the attorney fees shall be paid from the additional compensation.¹⁰

As previously noted, for some reason, the ALJ did not address the attorney fee issue in her Award. The respondent, at oral argument before the Board, did not object to the amount of time claimant's attorney claimed for his services or the \$100 hourly rate requested by the attorney. But the respondent objects to the attorney fee request because respondent claims claimant's attorney received additional compensation as a result of claimant not disclosing he was employed by Boeing until he was deposed on May 6, 1998. The Board finds that respondent's argument is without merit. Claimant's attorney provided reasonable and necessary services in representing claimant in connection with respondent's post-award application for review and modification. The applicable post-award attorney fee statute is clear that attorney fees "shall be awarded" by the director. The Board concludes claimant's attorney fee request is granted and respondent is ordered to pay claimant's attorney fees in the amount of \$2,735.

The respondent also requested the ALJ to find that the claimant violated the workers compensation fraud and abuse act found at K.S.A. 44-5,120 et. seq. The ALJ determined that she had no authority to determine whether there was a violation of the fraud and abuse provisions of the Workers Compensation Act and to order repayment of monies, civil penalties and costs. The Board agrees with the ALJ and affirms that finding.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that ALJ Nelsonna Potts Barnes' May 23, 2002, Review and Modification of an Award should be and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS, IN FAVOR of the claimant, Jack R. McChristian, and against the respondent, Total Petroleum, Inc., and its insurance carrier, Hartford Accident and Indemnity, for an accidental injury which occurred on December 12, 1991, and based on an average weekly wage of \$649.82 through September 27, 1996, and based on an average weekly wage of \$802.77 thereafter.

¹⁰ K.S.A. 1991 Supp. 44-536(g).

The claimant is entitled to 39.29 weeks of temporary total disability compensation at the rate of \$289 per week or \$11,354.81, followed by 210.85 weeks of permanent partial disability compensation at \$47.66 per week or \$10,049.11, for an 11 percent permanent partial general disability, followed by 63.57 weeks of permanent partial disability compensation at \$222.11 per week or \$14,119.53 for a 41.5 percent permanent partial general disability followed by 101.29 weeks of permanent partial disability compensation at \$58.87 per week or \$5,962.94 for an 11 percent permanent partial general disability, making a total award of \$41,486.39, which is all due, owing and ordered paid in one lump sum less any amounts previously paid.

The respondent is ordered to pay claimant's attorney fees in the amount of \$2,735.

The Board adopts all remaining orders contained in the ALJ's Review and Modification of an Award.

IT IS SO ORDERED.

Dated this _____ day of March 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Orvel Mason, Attorney for Claimant
Richard J. Liby, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge
Director, Division of Workers Compensation